OFFICIAL ASSIGNEE v. ANG KIM LEONG & ORS.

[O.C.J. (Thomson J.) February, 15, 1956]

[Ipoh — Bankruptcy No. 34 of 1954]

Bankruptcy Enactment (Cap. 55), s. 4 — Judgment against partnership — Execution can only issue against the individual partners if they have individually been served with the Summons or if leave of the Court is obtained — Judgment against partnership cannot be used to found a bankruptcy notice against a partner unless it can be executed against him without leave of the Court or unless leave of the Court has been obtained.

This was an application to have adjudicated bankrupt six persons who at one time carried on business as partners under the name of "Sin Hup Hin Oil Mill" a receiving order having already been made in respect of the firm.

The facts were that on November 21, 1953 one Sim Hung Kiok commenced proceedings against the firm in the firm's name and the summons were served on one Ang Kim Leong with a notice that the summons was served on him "as the person having the management and control of the defendant firm". No appearance was entered and on December 28, 1953, judgment was entered against the firm for the amount claimed and costs. The judgment was not complied with and on May 20, 1954, a bankruptcy notice was issued in respect of it which was served on Ang Kim Leong together with a notice stating that it was served on him "as the person having the control or management of the abovenamed debtor firm of Messrs. Sin Hup Hin Oil Mill". The notice was not complied with and on July 2, 1954 the judgment creditor filed a petition in bankruptcy against the firm in the firm's name, the alleged act of bankruptcy being failure to comply with the notice. That petition like the notice was served on Ang Kim Leong together with a notice that he was served as the person having the control or management of the firm. Proceedings were then taken to have adjudicated bankrupt Ang Kim Leong and five other persons who are alleged to have been partners in the firm.

Held: (1) the judgment in this case could not be executed upon against the other partners as they had not admitted or been adjudged to be a partner nor had they been individually served with the summons nor had leave of Court been obtained; (2) therefore as the judgment was not enforceable against them, no proceedings in bankruptcy could be taken so as to secure the adjudication as a bankrupt of any of the alleged partners in the firm.

Cases referred to :—

(1) *In re Ide* (1886), 17 Q.B.D. 755.

(2) *In re Sithamparam Chettiar* (1933-34) F.M.S.L.R. 332; (1935) M.L.J. 38.

(3) *Sadler v. Whiteman* (1910) 1 K.B. 868, 889.

(4) *In re Wenham* (1900) 2 Q.B. 698.

(5) *Lovell & Christmas v. Gilbert Walter Beauchamp* (1894) A.C. 607.

BANKRUPTCY.

S. Sivapragasam for the applicant.

M. S. Mahendran for 2nd, 3rd, 4th, 5th and 6th respondents.

Thomson J. : —This is an application to have adjudicated bankrupt six persons who at one time carried on business as partners under the name of 'Sin Hup Hin Oil Mill', a receiving order having already been made in respect of the firm.

The partnership, apparently, came into existence in 1949 and there is considerable controversy as to when it was dissolved. The date of dissolution, however, is not material to the present proceedings and I therefore find it unnecessary to deal with the point.

On 21st November, 1953, one Sim Hung Kiok commenced proceedings against the firm in the firm's name (Civil Suit No. 437 of 1953) for $21,925 being the amount due on nine cheques drawn in the firm's name between 22nd October, 1953, and 29th October, 1953, which had been given in respect of goods supplied to the firm and which had been dishonoured. The summons in that suit was served on one Ang Kim Leong together with a notice addressed to "The Managing Partner, Sin Hup Hin Oil Mill" to the effect that the summons was served on him "as the person having the management and control of the defendant firm abovenamed".

No appearance was entered and on 28th December, 1953, judgment was entered against the firm for the amount claimed and costs.

The judgment was not complied with and on 20th May, 1954, a Bankruptcy Notice was issued in respect of it which was served on Ang Kim Leong together with a notice addressed to him by name stating that it was served on him "as the person having control or management of the abovenamed debtor firm of Messrs. Sin Hup Hin Oil Mill." The Notice was not complied with and on 2nd July, 1954, the Judgment Creditor filed a Petition in Bankruptcy against the firm in the firm's name, the alleged act of bankruptcy being failure to comply with the Notice. That Petition like the Bankruptcy Notice was served on Ang Kim Leong together with a notice that he was served as the person having the control or management of the firm, and on 10th August, 1954, a receiving order was made on it in respect of the firm.

Proceedings have now been taken to have adjudicated bankrupt Ang Kim Leong and five other persons who are alleged to have been partners in the firm and it is with these proceedings that I am concerned here.

The application has been supported on the ground that the respondents were partners in the firm when judgment was had against it or that, at the very lowest, they were each of them liable in respect of the judgment debt. It has been opposed on the ground that they were not so liable.

I do not find it necessary to decide that issue for on consideration I have realised that there has been a very serious defect in the proceedings.

The judgment in Civil Suit No. 437 of 1953 was a good judgment against the partnership or, to speak more accurately, against all the persons who by reason of the partnership were liable in respect of the debt sued for. By reason, however, of section 410 of the Civil Procedure Code which, so far as it is relevant, is the same as R.S.C. O. XLVIIIA r. 8, which in its turn, so far as is relevant, is the same as R.S.C., 1883, O. XLII r. 10 which it replaced, execution on that judgment could only issue against the partnership property and could not issue against any individual partner unless he had admitted or been adjudged to be a partner, or had been individually served as a partner with the summons, or by leave of the Court. In fact, leave of the Court was not obtained, none of the present respondents admitted or was adjudged to be a partner or was served as a partner. The only person who was served was Ang Kim Leong and, although the notice which was served on him with the summons was addressed to "The Managing Partner" it expressly stated that the summons was served on him as the person having control or management of the firm.

In the circumstances, the proceedings in Civil Suit No. 437 of 1953 as they stand at present cannot possibly form the basis on which any of the individual partners can be adjudicated bankrupt. That is abundantly clear from the decision of the Court of Appeal in the case of *In re Ide*[1] which was followed locally as long ago as 1934 by Mudie J. in the case of *In Re S.M.R.M. Sithamparam Chettiar*[2]. The judgments of their Lordships in *Ide's* case *supra* may be briefly summarised as being to the effect that by reason of the wording of section 4(i)(g) of the Bankruptcy Act, 1883, which so far as is material is the same as that of our Bankruptcy Enactment section 4(i)*(i)*, a bankruptcy notice can only be founded on a judgment which is immediately enforceable and that by reason of R.S.C., 1883, O. XLII r. 10 (now R.S.C. O. XLVIIIA r. 8), which is the same as our Civil Procedure Code section 410, a judgment against a firm does not fall within that description so far as concerns any individual partner unless it can be executed against him without leave of the Court or unless and until leave of the Court has been obtained.

The application of the Official Assignee must therefore be dismissed.

Let me make myself perfectly clear. I do not think I am overlooking any of the provisions of the Bankruptcy Enactment or of the rules made thereunder. What I am saying, and I am saying it on the authority of *Ide's* case, *supra*, is that on the present state of the proceedings in Civil Suit No. 437 of 1953 no proceedings can be taken in bankruptcy so as to secure the adjudication as a bankrupt of any of the alleged partners in the firm.

It must never be forgotten that under the law of England, unlike the law of Scotland, a partnership is not a legal *persona*. As it was put by Farwell L.J. in the case of *Sadler v. Whiteman*[3] :—

> "In English law a firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience under Order XLVIII.A it may be used for the sake of suing and being sued."

Nowhere is it more important to observe this principle than in matters of bankruptcy. By section 4(i)*(i)* of the Bankruptcy Enactment a judgment creditor whose judgment has not been satisfied may serve his debtor with a bankruptcy notice and failure to comply with such a notice amounts to an act of bankruptcy which is an available foundation for a bankruptcy petition. Where a number of debtors who are partners have been sued in the firm's name then by bankruptcy rule No. 217 service of any notice or petition on the person having the control or management of the partnership business is to be deemed to be good service on each of the members of the firm. By section 5 of the Enactment, the Court may, on a bankruptcy petition, make a receiving order. By rule No. 219 a receiving order made against a firm "shall operate" as if it were a receiving order made against each of the persons who at the time of the order is a partner in that firm. And by section 20, at the time of making a receiving order the Court shall adjudge the debtor bankrupt always provided that when a receiving order is made against a firm in the firm's name the Court shall not adjudge any person bankrupt as a member of the firm unless such person is proved to be a partner.

That is all very true. I have no doubt the effect of rule No. 217 is that each of the present respondents who was indeed a partner (or possibly who was liable as such — see *In re Wenham*[4]) is to be deemed to have been properly served with the bankruptcy notice and the petition. The real question, however, is, was

any of these persons against whom execution could not issue in Civil Suit No. 437 of 1953 a person against whom under section 4(i) *(i)* of the Bankruptcy Enactment, a bankruptcy notice could be issued, upon failure to comply with which he could be made a bankrupt? That was the question which Lord Esher asked himself in *Ide's* case, *supra,* and that is the question which for reasons he stated His Lordship answered in the negative. And in the present case it is clear from what has been said that none of the present respondents is a person against whom execution could issue in Civil Suit No. 437 of 1953.

The Judgment Creditor could have done two things. At the commencement he could have served the proceedings upon each of the alleged partners. Or after judgment he could have asked for leave of the Court for execution to issue against any or all of them. He has failed to do either of these things and in the circumstances he is not in a position, and never has been, to take proceedings in bankruptcy which can result in any of these individuals being adjudicated.

Before departing from the case, there is one point which calls for attention. The receiving order against the firm may have been properly made. I do not propose to consider the point unless it is raised in appropriate proceedings.

In the course of the present proceedings, however, it has become clear that one of the respondents, Ang Soon Chong by name, at all material times has been and still is a minor. The judgment debt clearly arises from a trading debt and, in the circumstances, I think I should follow the course taken in *Lovell & Christmas* v. *Gilbert Walter Beauchamp*[5] and order that the receiving order be amended so as to exclude him.

As regards the question of costs, although the respondents have been successful they have succeeded on grounds which they themselves did not raise and had the matter depended on the grounds which they did raise they could not have succeeded for quite frankly I did not believe their evidence or that of their witnesses. To my mind their whole case depended on a deliberate and false fabrication. In the circumstances, I will make no order as to costs.

Order accordingly.

A. E. REYNOLDS v. PUBLIC PROSECUTOR

[A.Cr.J. (Thomson J.) February 15, 1956]

[Ipoh — Criminal Appeal No. 7 of 1956]

Penal Code s. 420 — Cheating in respect of mileage claims — Interpretation of Financial General Orders.

In this case the learned President of the Sessions Court convicted the appellant on the following charge: "That you on or about the 2nd day of May 1955 at Parit Buntar Police District Headquarters, Parit Buntar in the State of Perak cheated the Government of the Federation of Malaya to wit by submitting false mileage claims as per schedule attached for the month of April 1955 and thereby dishonestly induced the said Government of the Federation of Malaya to deliver to you property to wit cash $17-88 cts. and thereby committed an offence punishable under section 420 of the Penal Code." The basis of the charge was that the various journeys specified had not been performed by the appellant in his own motor vehicle but had been performed in police vehicles driven by police drivers. It appeared that at the material times the appellant's car a Wolseley was in Penang and that he used an M.G. car which was lent to him. This car was kept and maintained by the appellant. After hearing the appellant's evidence the learned President asked himself the question "Did the accused really think he was entitled to make a claim for these journeys when they were made in the M.G. car and not in his own Wolseley car?" He held that the appellant ought to have known that he was not so entitled because of Financial General Orders No. 256 which reads as follows:—"Mileage is payable only if — (a) the journeys in question are on Government duty; (b) they are made in a vehicle kept and maintained by the officer making the claim,...." In coming to his decision the learned President accepted the evidence of officers of the Police department, who gave evidence as to the meaning of the General Orders, to be conclusive.

Held: (1) the question of the construction of the General Orders was a question for the Court to decide (2) on a reasonable construction of the General Orders, it was possible for the appellant to act on the assumption that he could make a mileage claim for journeys even if the journeys were not made in his own vehicle but in a vehicle borrowed by him and kept and maintained by him; (3) if the learned President had taken the view that the appellant was entitled to mileage in respect of the journeys performed in the M.G. car it was abundantly clear that he could have dismissed the charge and therefore the conviction must be set aside.

MAGISTRATE'S CRIMINAL APPEAL.

S. K. Das for the appellant.

A. P. Jack (Federal Counsel) for the respondent.

Thomson J. (delivering oral judgment): — This appellant, who is an Assistant Superintendent of Police and, at all material times, was the officer commanding the Police district of Krian, was tried in the Sessions Court at Taiping on three charges of cheating in contravention of section 420 of the Penal Code. The second and third charges against him were dismissed without his being called upon to make his defence but on the first charge he was convicted and fined $250 or two months' imprisonment in default.

Against that conviction and sentence he has now appealed.

The charges against the appellant arose out of monthly claims for mileage which, in common with many other servants of Government, he was entitled to make against Government in respect of journeys done by him in the course of and for the purposes of his official duties by means of his own motor car. That motor car would appear to have been a Wolseley motor car although I think I should observe there is very